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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 986.

THE UNITED STATES, APPELLANTS,

vs.

LYMAN B. PERKINS.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 29, 1885.

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1 II.—*Petition.*—*Filed September* 15, 1883.—*A. H.*

In the Court of Claims.

LYMAN B. PERKINS
vs.
THE UNITED STATES. } No. 14036.

To the honorable Court of Claims:

Lyman B. Perkins respectfully prefers his petition, to wit:

First. That he is a citizen of the United States, and resident of the State of Connecticut.

Second. That in the year 1877 he received an appointment as a cadet-engineer in the Navy of the United States, and entered upon the prescribed course of instruction at the Naval Academy.

That June 10, 1881, he graduated from said Academy, received a diploma in the usual form attesting such graduation, and an official order detaching him from said Academy.

That thereafter he was regularly classified in the official register of the Navy Department as a "graduate" of said Naval Academy, and was paid the salary provided by law for cadet-engineer graduates. That after graduating as aforesaid and having been regularly classified for upwards of 1½ years upon the official record as a graduate, he was, on or about December 11, 1882, illegally reclassified as a "naval cadet," and his pay reduced under alleged authority of the provisions of the act of August 5, 1882, notwithstanding that said provisions had no proper application to him or any other cadet-engineer who had graduated prior to the passage of said act.

That petitioner never gave his consent to nor acquiesced in said action, but on the contrary joined with his classmates in opposing it in every way consistent with the discipline of the naval service. That notwithstanding said opposition, and notwithstanding the decision of this honorable court in the case of Leopold vs. The United States, fully sustaining petitioner's construction of said act, the Secretary of the Navy, in May, 1883, compelled petitioner and his classmates to return to the Naval Academy to undergo a so-called "graduating examination," in company with the naval cadets created by the said act of August 5, 1882. That notwith-

2 standing the illegal character of said examination, petitioner successfully passed it, as certified by the examining board; and thereupon petitioner received a letter from the Secretary of the Navy, purporting to discharge petitioner from the naval service from and after June 30, 1883, as a surplus graduate, under the act of August 5, 1882, with a "year's pay, as now provided by law for cadet-midshipmen." That thereupon your petitioner declined to acknowledge the validity of said discharge and declined to receive the year's pay, and so notified the Secretary of the Navy.

That since June 30, 1883, your petitioner has been waiting orders and holding himself in readiness to perform any duty that might be assigned to him as a cadet-engineer, and he has so informed the Navy Department from time to time.

Petitioner alleges that said discharge was unwarranted by law, and never having been acquiesced in by petitioner is null and void. That

prior to the act of August 5, 1882, petitioner was a graduated cadet-engineer, and he still remained so after said act was passed; that being such, the provision of said act in regard to the naval cadets therein created had no application to him; that never having been lawfully dismissed he is still legally in the naval service, and that he is entitled to the salary of his office as fixed by law, although for the time being he is deprived of the privilege of performing the duties thereof.

Petitioner therefor alleges that he is entitled to receive from the United States his salary as a cadet-engineer in the Navy from June 30, 1883, to September 1, 1883, at the rate of $600 per year, as provided by section 1556 of the Revised Statutes, amounting to $100.

Wherefore he prays judgment for $100.

LYMAN B. PERKINS,
Petitioner.

J. W. DOUGLASS,
Attorney for Claimant.

STATE OF CONNECTICUT,
City of Hartford, ss:

Personally appeared before me, a notary public in and for the State aforesaid, Lyman B. Perkins, who made oath in due form and according to law that the statements made in the foregoing petition are true, and that no assignment or transfer of the claim as herein set forth, or any part thereof or interest therein, has ever been made, to the best of my knowledge and belief.

Witness my hand and seal this 12th day of September, A. D. 1883.

[SEAL.] NATHAN F. PECK,
Notary Public.

3 II.—*General traverse—Filed Oct.* 6, 1883.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney General.

4 III.—*Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This cause having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

In 1877 claimant entered the Naval Academy as a cadet-engineer, and on June 10, 1881, having successfully passed the final academic examina-

tion, received the following certificate, signed by the officers of the Academy:

United States Naval Academy.

This certifies that Cadet-Engineer Lyman B. Perkins has completed the prescribed course of study at the United States Naval Academy, and has successfully passed the required examination before the academic board.

In witness whereof we have hereunto set our hands this tenth day of June, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and fifth.

F. V. McNAIR,
Commander, Presiding Officer of the Academic Board.
H. B. ROBESON,
Commander, Department of Ordnance and Gunnery.
E. M. SHEPARD,
Commander, Department of Seamanship.
W. W. HENDRICKSON,
Professor, Department of Mathemathics.
J. M. RICE,
Professor, Department of Mechanics and App'd Mathematics.
JAMES P. SPRAGUE,
Chief Engineer, Department of Steam Engineering.
P. F. HARRINGTON,
Lieut. Commander, Department of Astronomy and Navigation.
J. R. SOLEY,
Professor, Department of English Studies, History, and Law.
H. D. TODD,
Professor, Department of Physics and Chemistry.
L. F. PRUD'HOMME,
Professor, Department of Modern Languages.
MARSHAL OLIVER,
Professor, Department of Drawing.

Approved.

GEO. B. BALCH,
Rear Admiral, Superintendent.

II.

He was thereupon detached from the Naval Academy by the following order:

NAVY DEPARTMENT,
BUREAU OF NAVIGATION AND OFFICE OF DETAIL,
Washington, June 2nd, 1881.

SIR: You are hereby detached from the Naval Academy on the 10th inst.; proceed home, and regard yourself as waiting orders.

By direction of the Secretary of the Navy.

Respectfully,

WM. D. WHITING,
Chief of Bureau.

Cadet-Engineer LYMAN B. PERKINS,
U. S. Navy, Annapolis, Md.

5 III.

After leaving the Academy, the claimant and all his classmates were classified on the official Navy Register as having "graduated;" and up to December, 1882, they were regularly paid as such at the rates prescribed by section 1556 of the Revised Statutes, viz, $1,000 at sea, $800 on shore duty, and $600 on leave or waiting orders. In the same manner the cadet-engineers who completed their four years' course in 1878, 1879, 1880, were all regularly classified in the succeeding Navy Registers as having graduated in those years respectively; and, prior to December, 1882, they were all uniformly paid as such.

IV.

He received and obeyed the following orders:

NAVY DEPARTMENT,
BUREAU OF NAVIGATION AND OFFICE OF DETAIL,
Washington, July 13th, 1881.

SIR: Proceed to New York, and report to Commodore Cooper for duty on board the U. S. S. Quinnebaug, as the relief of Assistant Engineer W. O. Chrisman.

By direction of the Secretary of the Navy.

WM. D. WHITING,
Chief of Bureau.

Cadet-Engineer L. B. PERKINS,
U. S. Navy, Hartford, Conn.

NAVY DEPARTMENT,
BUREAU OF NAVIGATION AND OFFICE OF DETAIL,
Washington, 23 *June*, 1883.

SIR: You are hereby detached from the Naval Academy; proceed home, and regard yourself as waiting orders.

By direction of the Secretary of the Navy.

Respectfully,

J. G. WALKER,
Chief of Bureau.

Naval Cadet L. B. PERKINS,
U. S. Navy, Annapolis, Md.

V.

Subsequently he received the notice, and made the reply thereto, which follow:

NAVY DEPARTMENT,
Washington, June 26, 1883.

SIR: Having successfully completed your six years' course at the United States Naval Academy, and having been given a certificate of graduation by the Academic Board, but not being required to fill any vacancy in the naval service happening during the year preceding your graduation, you

are hereby honorably discharged from the 30th of June, 1883, with one year's sea-pay, as prescribed by law for cadet-midshipmen, in accordance with the provisions of the act of Congress approved August 5, 1882.

Respectfully,

WM. E. CHANDLER,
Secretary of the Navy.

Naval Cadet L. B. PERKINS,
United States Navy, Annapolis, Md.

HARTFORD, CONN., *July* 3, 1883.

SIR: I have the honor to acknowledge the receipt of the communication addressed to me, dated Washington, June 26, 1883, advising me of my discharge from the naval service by reason of the act of August 5, 1882.

6 As the provisions of that act authorize the discharge of no one but naval cadets, and as I graduated in 1881 as cadet-engineer, and the Court of Claims has unanimously held that we are not affected by those provisions, I am obliged to believe that my discharge is in error of law, and hence without force or effect.

If this be true I am legally in the naval service, and have no right to a year's pay now tendered me as naval cadet. For the time being, therefore, I respectfully decline to receive the said pay without in any way waiving my right to claim it if the decision of the Court of Claims should be reversed, or if it shall otherwise appear that I am legally discharged.

In so doing I mean no disrespect to the Department, but as a citizen and public servant I feel bound to respect the law as construed by the courts of law.

Very respectfully, your obedient servant,

LYMAN B. PERKINS,
Naval Cadet, United States Navy.

Hon. W. E. CHANDLER,
Secretary of the Navy, Washington, D. C.

It does not appear that the claimant had been guilty of any misconduct.

VI.

Thereafter, during the period of time for which he now claims salary, and in accordance with the regulations of the Navy, he reported himself monthly, in writing, as ready and willing to perform any duty the Department might assign to him as a cadet-engineer, with his address. He was not assigned to duty and has received no pay.

Conclusion of law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover the sum of one hundred dollars.

IV.—*Opinion of the court.*

RICHARDSON, C. J., delivered the opinion of the court:

In the case of Leopold v. The United States (18 C. Cls., 546) this court held that cadet-engineers who had finished their four years' course at the

Naval Academy, passed their final academic examinations, and received their diplomas before the passage of the act of August 5, 1882 (22 Stat. L., 285), became graduates and were not made naval cadets; that they are entitled to the pay provided by Revised Statutes, section 1556, p. 268, for cadet-engineers after final academic examination and until warranted as assistant engineers, and that the provisions in said act of 1882 for the discharge of surplus naval cadet graduates was prospective only, and not applicable to the classes of 1881 and 1882.

A motion for a new trial was made, and upon that motion the whole case was reargued and thoroughly considered. The court unanimously reaffirmed its former decision and overruled the motion.

No appeal was taken and the judgment of the court stands.

Again, at the present term, the same questions were raised, argued, and reconsidered in Redgrave's case (ante 226), and the same conclusions were unanimously reached by the court.

7 The present case, on principle, is precisely like those we have thus decided, and is ruled by them except in one particular, which alone was argued at the trial, which we are now to pass upon.

The claimant received the notice and made the reply, which are as follows:

NAVY DEPARTMENT.
Washington, June 26, 1883.

SIR: Having successfully completed your six years' course at the United States Naval Academy, and having been given a certificate of graduation by the Academic Board, but not being required to fill any vacancy in the naval service happening during the year preceding your graduation, you are hereby honorably discharged from the 30th of June, 1883, with one year's sea-pay, as prescribed by law for cadet-midshipmen, in accordance with the provisions of the act of Congress approved August 5, 1882.

Respectfully,

WM. E. CHANDLER,
Secretary of the Navy.

Naval Cadet L. B. PERKINS,
United States Navy, Annapolis, Md.

HARTFORD, CONN., *July* 3, 1883.

SIR: I have the honor to acknowledge the receipt of the communication addressed to me, dated Washington, June 26, 1883, advising me of my discharge from the naval service by reason of the act of August 5, 1882.

As the provisions of that act authorize the discharge of no one but naval cadets, and as I graduated in 1881 as cadet-engineer, and the Court of Claims has unanimously held that we are not affected by those provisions, I am obliged to believe that my discharge is in error of law, and hence without force or effect.

If this be true, I am legally in the naval service, and have no right to a year's pay now tendered me as naval cadet. For the time being, therefore, I respectfully decline to receive the said pay, without in any way waiving my right to claim it if the decision of the Court of Claims should be reversed, or if it shall otherwise appear that I am legally discharged.

In so doing I mean no disrespect to the Department, but, as a citizen and public servant I feel bound to respect the law as construed by the courts of law.

Very respectfully, your obedient servant,

LYMAN B. PERKINS,
Naval Cadet, United States Navy.

Hon. W. E. CHANDLER,
Secretary of the Navy, Washington, D. C.

On the part of the defendants it is contended that although the Secre- of the Navy in the notice of honorable discharge assigned as a reason for it that he acted under authority of the act of August 5, 1882, which this court has decided did not confer such authority, still, if the Secretary otherwise had the right to discharge the claimant the order of discharge is not vitiated by a wrong recital of power, but is valid and effectual. There is some authority for this position (Kaufman's case, 11 C. Cls., 668, 669; Wright's case, 15 C. Cls., 90), but without passing upon it definitely we will proceed to consider whether, under any other authority, the Secretary had the right thus to discharge the claimant.

In support of such authority it is urged that as cadet-engineers are appointed by the Secretary of the Navy under the provisions of Revised Statutes, section 1523, they may be removed by him arbitrarily under an implied power incident to the right to appoint. (Ex parte Hennen, 13 Peters, 256; Keyes v. The United States, 109 U. S., 336; Blake v. The United States, 103 U. S., 227; Ware v. United States, 4 Wall., 632; Avery v. Tyringham, 3 Mass., 177; 4 Opins. Att'y Gen., 603; 5 Opins., 288; 9 Opins., 313; 10 Opins., 204).

In 1807 it was held by the supreme judicial court of Massachusetts, Chief Justice Parsens delivering the opinion, that: "It is a general rule that an office is holden at the will of either party unless a different tenure be expressed in the appointment, or is implied by the nature of the office, or results from ancient usage."

In ex parte Hennen (13 Peters, 259) the leading case on the subject in the Supreme Court of the United States, decided in 1839, the court say: "In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.

8 In curtailment of this implied power of removal as incident to the power of appointment section 1229 of the Revised Statutes provides that "No officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." The claimant was never tried by a court-martial.

To overcome this provision it is urged on the part of the defendants that the claimant, a cadet-engineer after graduation, was not an officer in the naval service.

In this view we cannot concur. That a cadet-engineer like the claimant was a graduate and in the naval service we have already decided; that he was an officer is made manifest by the terms of the Constitution, which provides that "Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law,

or in the heads of Departments." Congress has by express enactment vested the appointment of cadet-engineers in the Secretary of the Navy, and when thus appointed they become officers and not employés. (United States v. Germaine, 109 U. S., 508; Moore v. United States, 95 U. S., 760; United States v. Hartwell, 6 Wall., 385.)

It is further urged that this restriction of the power of removal is an infringement upon the constitutional prerogative of the Executive, and so of no force, but absolutely void. Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution (article 2, section 2) does not arise in this case and need not be considered.

We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.

It follows that as the claimant was not found deficient at any examination, and was not dismissed for misconduct under the provisions of Revised Statutes, section 1525, nor upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof, according to Revised Statutes, section 1229, he is still in office and is entitled to the pay attached to the same.

Judgment will be entered in favor of the claimant for $100.

NOTT, J., did not sit in this case and took no part in the decision.

Note.

In the case of Leopold vs. The United (18 C. Cls., 546), above referred to, the following was the opinion of the court, which is reaffirmed in the foregoing decision, and in Redgrave case at the present term:

9 *Opinion.*

SCOFIELD, J., delivered the opinion of the court:

In 1878 claimant entered the Naval Academy at Annapolis as a cadet-engineer. June 9, 1882, having completed the prescribed term of four years and successfully passed the final academic examination, he received the usual "diploma" or "certificate of proficiency," and was thereupon detached from the Academy by order of the Secretary of the Navy. Thereafter he was placed upon the Navy Register as a "graduate," and became entitled to receive, and, until December 11, 1882, did receive, the increased rate of pay provided for in section 1556 of the Revised Statutes. After that date his pay was reduced to $500 a year. This reduction was based upon a construction put upon some portions of

the naval appropriation act of August 5, 1882 (22 Stat. L., 286), by the Navy Department, and adopted by the accounting officers of the Treasury. By this construction cadet-engineers who had completed their academic course in 1881 and 1882 were transformed into "naval cadets." Claimant, unwilling to abide by this interpretation of the law, in order to obtain, if possible, a judicial construction, brings this suit, nominally, as it is said, to recover the small amount of withheld pay.

Cadet-midshipmen, whose academic course in preparation for the duties of the "line" was required to be six years (Rev. Stat., 1520), and cadet-engineers, whose "course of instruction" in preparation for the duties of the Engineer Corps was required to be "four years at the Academy" and "two years' service in naval steamers," were, prior to the act of August 5, 1882, educated, under their respective titles, for their prospective and respective duties in the Naval Academy at Annapolis. They were paid as follows:

"Midshipmen, after graduation, when at sea, one thousand dollars; on shore duty, eight hundred dollars; on leave, or waiting orders, six hundred dollars.

"Cadet-midshipmen, five hundred dollars.

"Cadet-engineers: Before final academic examination, five hundred dollars; after final academic examination, and until warranted as assistant engineers, when on duty at sea, one thousand dollars; on shore duty, eight hundred dollars; on leave, or waiting orders, six hundred dollars." (Rev. Stat., 1556.)

Cadet-midshipmen, during such period of their course of instruction as they shall be at sea in other than practice-ships, shall receive as annual pay not exceeding $950. (Richardson's Supplement to Rev. Stat., 294.)

The following extracts from the act of August 5, 1882 (22 Stat. L., 286), includes all that is supposed to affect this case:

"For pay of the Navy, for the active list, namely: * * * sixty-nine chief engineers, one hundred passed assistant engineers, thirty-five assistant engineers, seventy-three cadet-engineers (graduates), * * * one hundred and two cadet-engineers, one hundred and thirty cadet-midshipmen (not graduates); in all, four million forty-eight thousand three hundred dollars.

"Provided, That hereafter there shall be no appointments of cadet-midshipmen or cadet-engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each Congressional district and at large, as now provided by law for cadet-midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called 'naval cadets;'

"And from those who successfully complete the six years' course, appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line, and Engineer Corps of the Navy, and of the Marine Corps;

"And provided further, That no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year; such appointments to be made from the graduates of the year, at the conclusion of their six years' course, in the order of merit, as determined by the Academic Board of the Naval Academy; the assignment to the vari-

ous corps to be made by the Secretary of the Navy, upon the recommendation of the Academic Board.

"But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years' course during the year eighteen hundred and eighty-two. And if there be a surplus of graduates, those who do not receive such appointment shall be given a certificate of graduation, an honorable discharge, and one year's pay, as now provided by law for cadet-midshipmen. * * *

10 * * * "That the pay of naval cadets shall be that now allowed by law to cadet-midshipmen; and as much of the money hereby appropriated as may be necessary during the fiscal year ending June thirtieth, eighteen hundred and eighty-three, shall be expended for that purpose. * * *

"That no officer now in the service shall be reduced in rank or deprived of his commission by reason of any provision of this act reducing the number of officers in the several staff corps; provided, that no further appointments of cadet-engineers shall be made by the Secretary of the Navy under section three of the act of eighteen hundred and seventy-four."

The accounting officers held that under the first proviso in the second paragraph of this law cadet-engineers who had completed their academic course in 1881 and 1882, but had not yet had "two years' service on naval steamers," were still to be considered "under-graduates" at the Naval Academy, and so became under this law "naval cadets," entitled to pay only at the rate of $500 a year. The claimant and the other cadet-engineers, on the contrary, contend that after completing their academic course and receiving diplomas or certificates of proficiency, their connection with the Academy was entirely severed; that they then became "graduates," and could in no sense be considered "under-graduates at the Naval Academy."

Upon the meaning of these two words, graduates and under-graduates, as used in the statutes, the question in dispute must be mainly settled. That these terms might have been applied technically either to the academic graduation or the completion of "two years' service in naval steamers" may well be admitted. The question to be settled is not how they might have been properly applied, nor even how they were applied in Navy circles, but to which period of time Congress intended to apply them in this act.

In considering this question it should not be forgotten that the two additional years required to fill up the six-year course of cadet-engineers are not years of study, but of "service." They do not go to sea in practice-ships, nor in other ships, in large numbers, mainly for educational purposes. They are not subject to academic orders, nor are they expected to pursue academic studies, but to take charge of and run the engines. Their school exercises are ended and their life work begun. They are as much in the service and as subject to all its requirements as they ever will be. When at the end of two years—or rather at the end of a cruise, which may last three years or more—they are examined, it is for promotion only. This examination is not at the Academy nor before the Academic Board, but is the same kind of an examination that every officer, at each

step in his advancement, is required to undergo. So emphatically does the law consider these two years as years of service that it doubles the pay.

In the universities the students who have honorably passed through the prescribed course of study and received certificates to that effect are known and catalogued as graduates. According to the dictionaries, it is a proper designation. Cadet-engineers who have successfully completed their academic course, passed the closing examination, and received from the Academic Board certificates to that effect, have hitherto been called in Navy parlance "graduates." In the official Navy Register, revised and republished twice a year, they are ranged under the head of "graduates." Under the head of "Date of graduation" the time when they left the Academy is given. Under the head of "Sea service since graduation" all sea service after leaving the Academy is recorded. Congressmen, especially those on naval committees, become familiar with these registers. As every Representative in the House nominates a cadet at the Academy, and naturally takes a deep interest in him and the institution, this classification and designation could scarcely escape his attention. Under these circumstances it is not unfair to presume that in using the terms graduate and under-graduate Congress followed the definition of the schools, the dictionaries, and the Navy Register.

11

But in arriving at the meaning attached to these words by Congress we are not entirely dependent upon this presumption. The word "graduate" is twice used in this very law, where, by the connection, its legislative meaning cannot be mistaken. First, in making an appropriation for the pay of these cadet-engineers, to distinguish them from others still in the Academy, it calls them "graduates." Second, in these words, "Nor deprive of such appointment any graduate who may complete the six years' course in 1882." If "any graduate" means a cadet who had already completed a six years' course, it makes very clumsy tautology. It would be the same as to say "a graduate who may become a graduate in 1882." It doubtless refers to cadet-engineers who graduated at the Academy in 1880, and whose two years' term of sea-service would expire in 1882.

The naval appropriation act of March 3, 1883, shows very clearly how Congress construed its own act. It makes an appropriation for the pay of sixty-two cadet-engineers. By referring to the Navy Register of July, 1882, it appears that this is the exact number of cadet-engineers who had graduated at the Academy, but were not yet eligible to promotion, or whose promotion had been delayed. It includes the classes of 1880, 1881, and 1882. The act then appropriates for the pay of three hundred and thirty-five naval cadets. These constitute the "under-graduates" of the act of August 5, 1882. It is probably the number of cadet-engineers actually at the Academy added to the number of under-graduate cadet-midshipmen. If Congress had concurred in the defendants' construction of the law they would have made a single appropriation for three hundred and ninety-seven naval cadets. This amounts to a legislative construction of the act of August 5, 1882. (United States vs. Freeman, 3 How., 556.)

In arriving at the meaning of the law, the words "at the Academy," following "under-graduates," should not be overlooked. They are words

of more definite description, added, apparently to preclude all doubt as to what cadets were designated as "under-graduates." It seems very conclusive of the intention of Congress. It is said, in avoidance of it, that in contemplation of law these graduates, although scattered all over the world, might still be be considered "under-graduates at the Academy." It may, with much propriety, be said that cadet-midshipmen who are sent to sea in squads, mainly for instruction, and who return to the Academy at the termination of the cruise for the final graduating examination, are in legal contemplation all the time "at the Academy." They have never been detached; but cadet-engineers, who have received their graduation certificates from the Board, and by order of the Secretary of the Navy been forever "detached" from the Academy and sent into actual, not educational, service, not in classes, but singly in war steamers over all the seas, can hardly, even in legal fiction, be considered as still "at the Academy."

The theory is too intangible to constitute a controlling element in the construction of the law.

In support of the defendants' position it is said that the words graduate and under-graduate might be properly employed to designate either of two events, to wit, graduation at the Academy or final graduation after two years of sea service. Graduation would scarcely be an apt word to indicate the close of two years' service. From what would they
12 then graduate? Certainly not from sea-service; that continues without change. Not from the grade of cadet-engineers, for they do not graduate from that until vacancies occur in the grade above. In the Navy Regulations the word is once used in the sense of defendants' construction, but even there it is connected with the word "finally," indicating that there has been a prior graduation at the Academy. But the question is not whether in some technical sense under-graduate and graduate might be applied to the ending of the two years' service, but whether they were so applied by Congress in the act under consideration.

It is also suggested by the counsel for the defendants that the protection given to the claimant and his associates by this construction of the law would be of short duration. Because upon the completion of the six-years' course, under the surplus graduate clause, they must all be discharged. By a careful examination of this clause it will be seen that the classes of 1881 and 1882 are not embraced within it. Being entirely prospective in character, it applies only to the surplus of naval-cadet graduates.

It is further said in objection that the act makes no provision for the promotion of the classes of 1881 and 1882. They must remain so long as this act is in force as cadet-engineers. This may perhaps be the case, but in the judgment of the claimant, and presumably of his classmates, that position is better than the one to which the defendants' construction would consign them; for by that construction they are at once reduced one-half in pay, and ordered to an examination in branches of naval education to which they have given little or no attention, in competition with cadet-midshipmen, who, for six years, under able instructors, have made these branches a special study. Under such disadvantage it is not strange that they anticipate failure. In that event they leave the service with mortification to themselves, and to the outside world with apparentthough un deserved discredit. Admitting, however, that the hardship of these young

men would be somewhat mitigated by the defendants' position, the court would not for this reason be justified in giving its sanction to a construction whereby the intention of Congress, somewhat obscure in a cursory reading, but upon a careful examination too plain for unbiased mistake, is entirely ignored. We cannot agree to the ruling of the accounting officers of the Treasury, and therefore direct judgment to be entered in favor of the claimant in the sum of $50.50.

13 V.—*Final judgment.*

At a Court of Claims, held in the city of Washington on the 1st day of June, A. D. 1885, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Lyman B. Perkins do have and recover of and from the United States the sum of one hundred dollars ($100.00).

14 VI.—*Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 1st day of June, 1885, in favor of claimant; the defendants, by their Attorney-General, on the 15th day of June, 1885, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Assistant Attorney-General.

Filed June 15, 1885.

Allowed June 15, 1885.

WILLIAM A. RICHARDSON,
Chief Justice.

15 In the Court of Claims.

VII.

LYMAN B. PERKINS
vs.
THE UNITED STATES. } No. 14036.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment, of the application of defendants for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 16th day of September, 1885.

[SEAL.] ARCHIBALD HOPKINS,
Clerk Court of Claims.

(Indorsement on cover:) No. 986. The United States, appellant, vs. Lyman B. Perkins. Court of Claims. Filed September 29, 1885.

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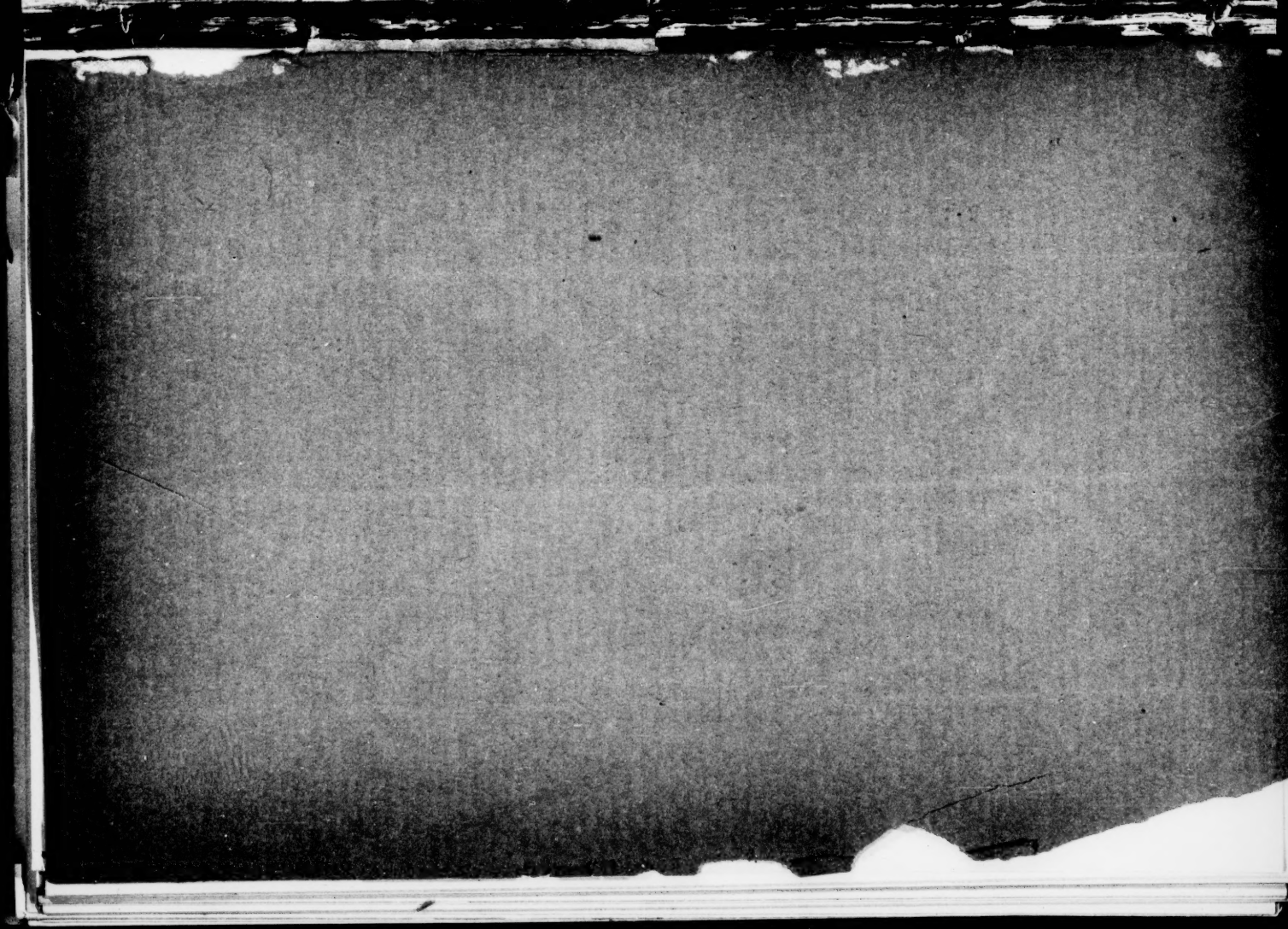
Supreme Court of the United States.

OCTOBER TERM, 1885.

UNITED STATES
vs.
LYMAN B. PERKINS. } No. 986.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.



Supreme Court of the United States.

OCTOBER TERM, 1885.

UNITED STATES
vs.
LYMAN B. PERKINS. } No. 986.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

The only difference between this case and the case *United States* vs. *Redgrave*, No. 986 of this current term, is that the appellee, Perkins, claims to be in the Navy still, having declined to accept the year's pay proffered in the letter of the Secretary of the Navy informing him that he was honorably discharged, but this difference is not at all material in the discussion of the questions arising upon the interpretation of the act of 5th August, 1882 (22 Stat., 285).

The cases being thus identical in principle, we respectfully refer to the brief in *The United States* vs. *Redgrave* for the grounds and arguments upon which we contend that the judgment of the eminent court below should be reversed, with instructions to dismiss the claimant's petition.

WM. A. MAURY,
Assistant Attorney-General.

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Supreme Court of the United States.

OCTOBER TERM, 1885.

UNITED STATES, *Appellant*,
vs.
DE WITT C. REDGRAVE. } No. 985.

UNITED STATES, *Appellant*,
vs.
LYMAN B. PERKINS. } No. 986.

Appeals from the Court of Claims.

Brief for Appellees under Rule XX.

J. W. DOUGLASS,
Att'y for Appellees.

W. H. MOORE, PRINT. NO. 511 ELEVENTH ST.

Supreme Court of the United States.

OCTOBER TERM, 1885.

UNITED STATES, *Appellant*,
vs.
DE WITT C. REDGRAVE. } No. 985.

UNITED STATES, *Appellant*,
vs.
LYMAN B. PERKINS. } No. 986.

Appeals from the Court of Claims.

Brief for Appellees under Rule XX.

I.

These cases arose under the following paragraphs of the act of *August* 5, 1882, (22 Stat. L., 286), (as did also the case of Leopold *vs.* The United States, 18 C. Cl., 546:)

For pay of the Navy, for the active list, namely: * * * sixty-nine chief engineers, one hundred passed assistant engineers, thirty-five assistant engineers, seventy-three *Cadet-Engineers (graduates)*, * * * one hundred and two Cadet-Engineers, one hundred and thirty cadet-midshipmen (not graduates;) in all, four million forty-eight thousand three hundred dollars.

Provided, That hereafter there shall be no appointments of cadet-midshipmen or cadet-engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each Congressional district and at large, as now provided by law for cadet-midshipmen, and *all the undergraduates at the Naval Academy* shall hereafter be designated and called "naval cadets;"

And from those who successfully complete the six years' course, appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line, and Engineer Corps of the Navy and of the Marine Corps;

NOTE.—Whenever *italics* are used in the language of the Statutes quoted in this brief, they are mine. J. W. D.

And provided further, That no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year; such appointments to be made from the graduates of the year, at the conclusion of their six years' course in the order of merit, as determined by the Academic Board of the Naval Academy; the assignment to the various corps to be made by the Secretary of the Navy, upon the recommendation of the Academic Board.

But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years' course during the year eighteen hundred and eighty-two. And if there be a surplus of graduates, those who do not receive such appointment shall be given a certificate of graduation, an honorable discharge and one year's pay, as now provided by law for cadet-midshipmen. * * *

* * * That the pay of naval cadets shall be that now allowed by law to cadet-midshipmen; and as much of the money hereby appropriated as may be necessary during the fiscal year ending June thirtieth, eighteen hundred and eighty-three, shall be expended for that purpose. * * *

That no officer now in the service shall be reduced in rank or deprived of his commission by reason of any provision of this act reducing the number of officers in the several staff corps: *Provided*, That no further appointments of Cadet-Engineers shall be made by the Secretary of the Navy under section three of the act of eighteen hundred and seventy-four.

II.

The central question in these cases is (as it was in the Leopold case,) Did the act of August 5, 1882, change the status and name of the "Cadet-Engineers," who had graduated *prior* to that act, into "Naval Cadets?" If the act did not make that change, then the reduction of pay in Redgrave's case and the refusal of pay in Perkins' case were wrongs to be righted.

Redgrave's suit is for pay *prior* to July 1, 1883, and Perkins' suit is for pay *after* that date. But in both cases the main question to be settled is, *was the claimant a "Cadet-Engineer," or a "Naval Cadet" after August* 5, 1882?"

III.

The act of August 5, 1882, provided pay for 73 "Cadet-Engineers (graduates,") and 102 "Cadet-Engineers, 130 cadet-midshipmen, (not graduates.") The claimants were among the 73.

Again, the proviso to the first paragraph of the act above pro-

vided that all the "under graduates at the Naval Academy shall hereafter be called Naval Cadets." It certainly is clear that the language "graduates" and "not graduates" imply a distinction of class or kind. And it certainly is equally clear that "not graduate" and "under-graduate" are, as used in the act, interchangeable and synomymous terms; therefore, when the act says that the "under-graduates" at the Naval Academy shall "become Naval Cadets," it means the "not graduates," and does not mean the "graduates." Graduate and under-graduate are diametrically differing terms, and always imply opposite conditions.

The action of the Department from August 5, 1882, until December, 1882, in paying the "Cadet-Engineers" their old rate of pay, (page 4, Perkins' Record,) as "graduates," shows that the Departmental interpretation of the act of August 5, 1882, was, *at first*, and for several months, the same as contended for by the claimants and held by the court below.

IV.

In addition to this early departmental construction, Congress itself, March 3, 1883, (Stat. L.,) gave what may be called an "authoritative interpretation" of the act of August 5, 1882, on the present question. In that act (March) it was provided as follows:

"For the pay of the Navy, for the active list, namely: * * * For sixty-two *cadet-engineers*, * * * three hundred and thirty-five *naval cadets*," &c.

The word "graduates" was no longer used by Congress. Why? Because all who were *not* graduates had been transformed into "Naval Cadets," and, there being but *one kind* of cadet-engineers left in the navy, there was no occasion to distinguish by additional titles. The claimants were among the 62 "cadet-engineers" provided for in the act of March, 1883, as being still in the navy. This act was an indisputable declaration by the law-making power that the act of August, 1882, did *not* transform these Cadet-Engineers ("graduates") into Naval Cadets. That it neither degraded nor abolished them, but that it left them a subsisting body in the United States navy.

The last paragraph of the act of August 5, 1882, as printed above, indicates clearly that Congress did not intend either to reduce the rank, cut down the pay, or abolish the Cadet-Engineers. It provides that—

"*No officer* now in the service shall be reduced in rank or deprived of his commission by reason of any provision therein reducing the number of officers in the several *staff* corps," and then adds: "*Provided*, That no further appointments of Cadet-Engineers shall be made by the Secretary," &c.

As Cadet-Engineers were appointed originally by the head of a Department, they were "officers." And the *proviso* immediately coupled with the above paragraph indicates that the Cadet-Engineers were especially in the mind of the legislature at the time.

The facts in the case (Records, pages 4 and 6) show that there had been for years two classes of "Cadet-Engineers," and described always under different heads in the official Navy Registers. Those who had left the Academy under a heading of "Graduates;" the others, at the Academy, simply as "Cadet-Engineers." With this departmental practice and general understanding the act of August 5, 1882, as interpreted by the court below, is in perfect accord.

V.

Official letters were addressed to both of the claimants by the Department on the 2*d of June*, 1881, as follows:

"SIR: You are hereby detached from the Naval Academy on the 10th inst.; proceed home, and regard yourself as waiting orders.

"By direction of the Secretary of the Navy," &c.

And both were immediately put in the official Navy Register as *Cadet-Engineers, Graduates.*

The records also show that subsequent to these letters or orders the claimants were ordered to and performed duty *as officers* on various U. S. vessels, just as other officers of the staff or line did.

June 27, 1883, *two years* after the above letters or orders had been addressed and received, the following letters were also addressed to the claimants. (Records, pages 4 and 5:)

"SIR: You are hereby detached from the Naval Academy. Proceed home, and will regard yourself as waiting orders.

"By direction of the Secretary of the Navy," &c.

Having *once* been detached, (June 2, 1881,) *as a graduate*, from the Academy, he could not of course be detached a *second* time, (June 23, 1883,) except upon resignation and reappointment. The official certificates of graduation issued at the time of the regular detachment in 1881, (pages 2 and 3, Records,) show on their face that the claimants, respectively had—

"Completed the prescribed course of study at the United States Naval Academy, and had successfully passed the required examination before the academic board."

These certificates of graduation were signed by the superintendent and all of the professors at the Academy.

As it is certain that no one under graduate could graduate *twice* from the Academy under *one* appointment thereto, one of these antagonistic graduating detachments must have been meaningless and impotent. The claimants contend, as the court below held, that the first was the potent one, and that it could not be undermined in the way attempted.

VI.

The act of February 24, 1874, (18 Stat., p. 17,) provided that after the 30th of June, 1874, the course of Cadet-Engineers at the Academy should be *four years*. The course of Cadet-Midshipmen at the Academy (sec. 1520 R. S.) was *six years*. At the end of the four years course the Cadet-Engineer received the *same pay* as the midshipman at the end of the six years' course. (See sec. 1556 R. S.) In other words, the Cadet-Engineers after four years, like the cadet-midshipmen after six years, were graduated into the service as officers liable to duty and eligible to promotion.

In concluding this branch of the case, it can be said, without fear of proper denial, that every Cadet-Engineer who had completed his four years' course at the Academy since the act of 1874 went into effect, has been uniformly treated by the Navy Department as a "graduate;" every such Cadet Engineer has been uniformly classified, in the Navy Registers published by the De-

partment, as a "graduate;" every such Cadet-Engineer, with the knowledge, consent, and direction of the Navy Department, has been regularly paid as a "graduate;" and, at the time the act of August 5, 1882, was passed, there were upon the navy list seventy-three such "graduates," who were doing duty on various stations, scattered all over the globe.

Bearing these undeniable facts in mind, the provisions of the act of August 5, 1882, are to be construed.

VII.

Taking the act of August 5, 1882, either by itself or in connection with other acts, there is no room for doubt as to the meaning of the words "graduates" and "undergraduates" there employed. The former was undoubtedly derived from the Navy Register and the Annual Estimates for Appropriations, in which documents it had come to have a fixed and definite meaning; and the Supreme Court has expressly held that—

"Language adopted in framing a statute which has already acquired a fixed meaning, presumably known to the legislature, will be presumed to have been used in that meaning."—(98 U. S., 440.)

There is, therefore, little room for doubt that Congress used these terms advisedly, and when it expressly provided that "all the *under-graduates* at the Naval Academy" should thereafter be "designated and called Naval Cadets;" it meant just that and nothing more. *Expressio unius est exclusio alterius.*

The Department construction virtually makes this statute retroactive as to these claimants, and robs them of their character and pay as graduates, which they had already acquired by years of labor.

Yet it is well settled law that courts will not by implication extend the provisions of a statute beyond what was clearly expressed, when by so doing existing rights will be either violated or destroyed; and we read that—

"Where fundamental rights are overthrown, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such an object."—(Smith on Stat., sec. 548.)

It would seem that the patent distinction between the words "graduate" and "under-graduate" was sufficiently explicit without a resort to the rules of construction; but, if any such resort is necessary, we have not overlooked the rulings that—

"Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unles the language employed expresses a contrary intention in unequivocal terms." (24 How., 242; 2 Wall., 329; 3 Cran., 399; 9 C. Cl., 124.)

So, also, this court held, that—

"General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequences; and it will always be presumed, that the legislature intended exceptions to its language which would avoid results of this character." (7 Wall., 482.)

As a last resort the Navy Department is understood to rest its case against these Cadet-Engineers upon the theory that it is the general policy of Congress to economize in the Navy, and that therefore every doubt must be resolved in favor of that principle. But, unfortunately for this theory, also, this court has expressly decided that—

"What is termed the policy of the Government with reference to any particular legislation is too unstable a ground upon which to rest the judgment of the court in interpretation of statutes." (5 Wall., 107.)

It may not be amiss to say here that of the *forty-one* "graduates" who were directly interested in this question when the Leopold case was instituted (as a test case), all but *eleven* have, in the course of events, dropped out. The claimants are *two* of the eleven.

VIII.

Pages 4 and 5 of the records show that on the 26th of June, 1883, the Secretary of the Navy addressed the following letter of (attempted) dismissal to each of the claimants:

"SIR: Having successfully completed your six years' course at the United States Naval Academy, and having been given a certificate of graduation by the academic board, but not being required to fill any vacancy in the naval service happening during the year preceeding your graduation, you are hereby honorably discharged from the 30th of June, 1883, with one year's sea pay, as prescribed by law for cadet-midshipmen, in accordance with the provisions of the act of Congress approved August 5, 1882."

These letters were addressed to the claimants and all of their class (1881,) as "Naval Cadets."

The claimants both refused the proffered "one year's sea pay," and filed protests against the attempt to dismiss.

It is contended now, as it was below, for the claimants, that if the Secretary had no authority to classify the Cadet-Engineers who graduated in 1881 and 1882, *before* the act of August 5, 1882, as "naval cadets," then he could not treat them as "surplus graduates," for it is only "naval cadets" by that statute who can become "surplus graduates." And if the claimant was not a "naval cadet" and subsequently a "surplus graduate" under the statute, then he could not be legally discharged from the service under that act; and, consequently, is still a Cadet-Engineer, and entitled to pay at $600 per year when waiting orders.

The attempted discharge of the claimant was, as specifically stated by the Secretary in his letter of June 26, 1883, "in accordance with the provisions of the act of Congress approved August 5, 1882." Therefore, unless the power of the Secretary to first turn a Cadet-Engineer into a "Naval Cadet," and then into a "surplus graduate," and then "discharge" him from the naval service, is found within the provisions of that act, the attempted discharge was *ultra vires*, and of no legal effect. The letter itself limits the scope of the attempted official action, by specific terms, to the grant of power given by the act of August 5, 1882.

To this the United States replied, that—

"The fact that the Secretary of the Navy, in his letter discharging the claimant, stated that he did so under the provisions of the act of August 5, 1882, will not, of itself, vitiate the discharge, even if it shall be decided that the provisions of that law did not authorize the discharge"

And raised the question, that—

"If the Secretary had no authority to make this discharge under the act of August 5, 1882, had he the authority *aliunde?*"

IX.

This last issue embraces two inquiries:

1. *Were the claimants officers of the Navy on the 26th of June* 1883?

2. *How can an officer of the Navy be legally discharged from the service?*

On the first point (were they officers), the court below, in the Leopold case, discussing this question in their opinion, by Scofield, Justice, held, that—

"In considering this question, it should not be forgotten that the two additional years required to fill up the six years' course of Cadet-Engineers are not years of study, but of 'service.' They do not go to sea in practice ships, nor in other ships in large numbers, mainly for educational purposes. They are not subject to academic orders, nor are they expected to pursue academic studies, but to take charge of and run engines. Their school exercises are ended and their life-work begun. They are as much in the service and as subject to all its requirements as they ever will be." (18 C. Cl., 557.)

Section 1556 of the Revised Statutes, which provides for the pay of "*officers*," seamen, and others of the navy, enumerates "Cadet-Engineers" among the *officers*.

Section 1558, pursuing the same subject of pay, provides that—

"The pay prescribed in the two preceding sections shall be the full and entire compensation of the several *officers* therein named." * * *

The orders of the Department to the claimants *after* their graduation in 1881, commanding them to various duties in all parts of the world, in connection with the above statutory and other considerations, establishes, beyond doubt, we contend, that the claimants were *officers* of the Navy on the 26th of June, 1883, the date of the attempted discharge.

If the claimants were *officers* could the Secretary of the Navy